STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2006
v	No. 257662 Wayne Circuit Court
DAMIEN BANKS, Defendant-Appellant.	LC No. 03-009693-01

Before: Murray, P.J. and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for possession of marijuana with the intent to deliver, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to three years' probation for the possession with the intent to deliver marijuana conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the prosecution did not present sufficient evidence to support his convictions. We review a challenge to the sufficiency of the evidence in a bench trial de novo. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *Id.*

To prove possession with intent to deliver under MCL 333.7401(2)(d)(iii), the prosecution must show that the defendant knowingly and illegally possessed a controlled substance meeting the specified statutory weight requirements, and that he intended to deliver that substance. CJI2d 12.3. Proof of actual physical possession, however, is not necessary; proof of constructive possession will suffice. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, amended 441 Mich 1201 (1992). Further, possession need not be exclusive, but may be joint, with more than one person in actual or constructive possession. *Id.* at 520. "A person's presence at the place where the drugs are found is not sufficient, by itself, to prove constructive possession; some additional link between the defendant and the contraband must be shown." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

In this case, the prosecution presented sufficient evidence to allow a rational trier of fact to find beyond a reasonable doubt that defendant possessed the marijuana with the intent to deliver it. During pre-raid surveillance, police officers observed defendant standing on the porch

of a house "flagging" cars and making gestures known on the street to be "consistent with selling narcotics." After making these signals for approximately ten minutes, defendant entered the house. A couple of minutes later, defendant left the house and started walking down the street. At this point, a raid team entered the house and executed a search warrant. Inside the house, which appeared uninhabitable, they found eighteen small Ziploc bags filled with marijuana and a sandwich bag containing marijuana. These items were on top of a coffee table in the front room. Several empty Ziplocs were also found. Defendant was arrested two houses away. Defendant was also identified by an undercover source who had earlier made a controlled drug purchase at the same house. On the basis of this evidence, a rational trier of fact could have found beyond a reasonable doubt that defendant possessed marijuana with the intent to deliver.

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant,* 235 Mich App 499, 505; 597 NW2d 864 (1999). The question is whether the defendant possessed the firearm at the time he committed the felony, not at the time of the police raid or the arrest. *People v Burgenmeyer*, 461 Mich 431, 439; 606 NW2d 645 (2000).

As discussed above, the first element of defendant's felony-firearm charge is satisfied. With regard to the second element, a rifle was found behind the front door through which defendant entered and exited the house. Defendant had access to and control over the gun. Although defendant asserts that the gun was inoperable, operability is not an element of felony-firearm. *People v Thompson,* 189 Mich App 85, 86; 472 NW2d 11 (1991). On the basis of this evidence, a rational trier of fact could have found beyond a reasonable doubt that defendant possessed the firearm during the commission of a felony.

Defendant also argues that he was denied the effective assistance of counsel. Defendant did not seek an evidentiary hearing on the issue of ineffective assistance; therefore, our review is limited to mistakes apparent on the record. *People v Snider,* 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, a defendant "bears a heavy burden" and must show that counsel's performance was deficient. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. *People v Carbin,* 463 Mich 590, 599-600; 623 NW2d 884 (2001). Further, counsel's deficient performance must have resulted in prejudice. To demonstrate prejudice, a defendant must show a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*. at 600.

Defendant has failed to demonstrate that defense counsel was ineffective for "failing to allow defendant to testify." Whether a defendant testifies is a strategic decision best left to defendant and his counsel. *People v Martin,* 150 Mich App 630, 640; 389 NW2d 713 (1986). We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand),* 235 Mich App 429, 445; 597 NW2d 843 (1999). Furthermore, defendant counsel stated on the record that she discussed with defendant his right to testify and that "he's advised me he's not going to testify." The trial court asked defendant, "Is that right, Mr. Banks?" Defendant replied, "Yes." The trial court further asked defendant, "You understand it's your choice [to testify] and nobody else's, do you understand that?" To which defendant replied, "Yes, sir." If a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, the right to testify is deemed waived. *People v Simmons,* 140 Mich App 681, 684-685; 364 NW2d 783 (1985).

Defendant also contends that defense counsel was ineffective for failing to call other witnesses in his defense. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey,* 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to introduce evidence or call witnesses can constitute ineffective assistance of counsel when it deprives a defendant of a substantial defense; i.e., one that might have affected the outcome of the trial. *People v Daniel,* 207 Mich App 47, 58; 523 NW2d 830 (1994). On appeal, defendant has not identified any witness that should have been called or the substance of any witness's potential testimony. Thus, defendant has failed to demonstrate that defense counsel's decision to not call witnesses deprived him of a substantial defense.

Defendant also asserts that defense counsel failed to investigate "the exculpatory evidence and witnesses." However, defendant has failed to cite any record support for this assertion.[1] Furthermore, although defendant suggests that further investigation would have revealed that someone else was in possession of the marijuana, possession need not be exclusive and there was ample evidence linking defendant to the marijuana. Therefore, defendant has failed to sustain his burden of demonstrating that his counsel was deficient in this regard or that the asserted deficiency was outcome determinative.

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

[1] Defendant states in his brief on appeal, "there is no evidence in the record that Trial Counsel pursued nor [sic] investigated the exculpatory evidence and witnesses . . . ." However, *defendant* has the burden of demonstrating that defense counsel's representation was deficient, *Carbin, supra* at 599, and our review is limited to the record, *Snider, supra* at 423.